

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>EDWARD RANDO</b>	)	
Claimant	)	
VS.	)	
	)	
<b>TEXACO REFINING &amp; MARKETING</b>	)	Docket No. 187,546
Respondent	)	
AND	)	
	)	
<b>CIGNA</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent requested Appeals Board review of Administrative Law Judge John D. Clark's August 18, 1998, Award. The Appeals Board heard oral argument on March 12, 1999, in Wichita, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, Gerard C. Scott of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas. The Kansas Workers Compensation Fund (Fund) appeared by its attorney, Marvin R. Appling of Wichita, Kansas.

**RECORD**

The Appeals Board considered the record listed in the Award. Additionally, after oral argument, on June 1, 1999, the parties filed a stipulation that contained their agreement to include as part of the record the August 4, 1997, discovery deposition of the

claimant that was not listed as part of the record by the Administrative Law Judge or contained in the administrative file.

### **STIPULATIONS**

The Appeals Board has adopted the stipulations listed in the Award.

### **ISSUES**

The Administrative Law Judge found claimant had suffered injuries to his neck and right shoulder in a June 21, 1993, accident while working for the respondent. As a result of that accident, the Administrative Law Judge awarded claimant a 24 percent permanent partial general disability based on his resulting permanent function impairment. The Administrative Law Judge found the respondent had failed to prove the Fund had any liability for all or any portion of the Award.

Respondent appealed and argues that claimant's neck injury is related to degenerative changes and has no causal relationship to his work. In regard to claimant's alleged right shoulder injury, respondent contends claimant failed to prove that the rotator cuff tear was the result of the June 21, 1993, work accident. Furthermore, respondent argues, if either of claimant's alleged injuries are found to be related to his work, then the Fund is liable for all workers compensation benefits owed because of claimant's preexisting neck condition. Also, if compensation is awarded, then a credit is due for a September 19, 1989, compensable work-related neck injury that preexisted the June 21, 1993, accident.

Claimant, on the other hand, requests the Appeals Board to affirm the Administrative Law Judge's Award. The claimant contends the record proves he aggravated a preexisting neck condition and injured his right shoulder at work on June 21, 1993. Additionally, after the June 21, 1993, accident, claimant asserts his right shoulder was further aggravated in December 1994 or January 1995 while performing prescribed therapeutic exercises.

The Fund also urges the Appeals Board to affirm the Administrative Law Judge's Award. The Fund contends claimant was not a handicapped employee on the date of his work-related accident and further, if claimant did have a preexisting neck condition, the respondent did not have knowledge of this condition. The Fund contends it has no liability for the June 21, 1993, injury because respondent failed to prove that claimant was a handicap employee and that respondent had knowledge of the handicap.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the arguments of the parties, the Appeals Board finds as follows:

Claimant claims an aggravation to a preexisting neck condition that occurred at work on June 21, 1993, while he was tightening bolts in the process of repairing a boiler. Claimant further claims he suffered a right shoulder rotator cuff tear initially on June 21, 1993, and further aggravated the right shoulder injury while performing prescribed therapeutic exercises at home in December 1994 or January 1995. For reasons more fully discussed below, the Appeals Board concludes claimant's neck injury is compensable but his right shoulder injury is not.

**Did claimant prove he suffered a work-related accidental neck injury on June 21, 1993?**

The Appeals Board finds the most credible and persuasive evidence contained in the record concerning the causal relationship between claimant's work-related June 21, 1993, accident and his resulting neck injury is the testimony of claimant's treating physician, neurosurgeon Paul L. Stein, M.D. Dr. Stein treated and performed surgery on claimant's cervical spine for a previous September 19, 1989, work-related injury while claimant was employed by the respondent. He also treated and performed surgery for the June 21, 1993, injury, that is the subject of this appeal.

On September 19, 1989, claimant suffered an injury to his cervical spine while moving a welding cabinet at work. As a result of that injury, on February 1, 1990, Dr. Stein performed an anterior discectomy and interbody fusion at the C4-5 vertebrae level.

After the June 21, 1993, accident, Dr. Stein first saw claimant on July 15, 1994. Dr. Stein took a history from the claimant and reviewed a recent MRI examination and a myelogram with a CT scan of claimant's cervical spine. The history claimant gave Dr. Stein before the June 21, 1993, accident was that he was getting along reasonably well after his February 1, 1990, C4-5 anterior fusion. The 1990 surgery was for neck and left arm pain and the left arm pain had resolved after the surgery. Claimant's current complaints were for neck and right arm pain. Dr. Stein also conducted a physical examination of claimant. His impression was cervical strain with some mild cervical degenerative disc disease. At that time, he did not believe surgery would be beneficial and recommended conservative symptomatic treatment for claimant's neck discomfort.

But claimant's symptoms worsened and after claimant had been seen by other physicians, he was again referred, by respondent's insurance carrier, to Dr. Stein on January 31, 1996. Between the time that Dr. Stein saw claimant on July 15, 1994, and the return visit on January 31, 1996, claimant had undergone, on August 31, 1995, an operation performed by orthopedic surgeon Harry A. Morris, M.D., to repair a rotator cuff tear of the right shoulder. Dr. Stein's impression, after his examination of claimant on January 31, 1996, was possible cervical nerve root irritation particularly at C6 vertebra on the right. The doctor had claimant undergo another myelogram and post-myelogram CT scan. The post-myelogram CT scan showed poor nerve root fill bilaterally at the C6-7

vertebrae level. Dr. Stein thought claimant could benefit from a nerve root decompression but desired a second doctor's opinion before he attempted surgery.

Respondent's insurance carrier sent claimant to neurosurgeon Stephen L. Reintjes, M.D., and orthopedic surgeon David K. Ebelke, M.D., both located in Kansas City, Missouri. Dr. Reintjes felt that the nerve root was pinched between C6 and C7 and recommended surgery to decompress the nerve root. But Dr. Ebelke did not feel surgery would be of benefit and did not recommend surgery.

After explaining all of the risks of surgery to the claimant, Dr. Stein on July 15, 1996, performed a C6-C7 partial hemilaminectomy, medial facetectomy, and nerve root decompression.

Dr. Stein expressed his opinion that claimant had degenerative disc changes at the time of the 1990 surgery. Also, in 1996, claimant had degenerative changes in his cervical spine that were not necessarily related to the June 21, 1993, injury. But Dr. Stein also opined, to a reasonable degree of medical probability, that the June 1993 accident aggravated claimant's degenerative cervical disc disease resulting in further nerve root compression at the C6-7 vertebrae level. And surgery was the appropriate treatment option in an effort to relieve claimant of his pain and discomfort.

Dr. Stein's deposition testimony was taken on June 26, 1996, before he performed the second surgery on claimant's cervical spine on July 15, 1996. Therefore, Dr. Stein did not express an opinion on claimant's permanent functional impairment after the July 15, 1996, surgery. He also did not express an opinion on what, if any, permanent restrictions should be imposed.

Two Wichita, Kansas, physical and rehabilitation physicians, Pedro A. Murati, M.D., and Lawrence Blaty, M.D., examined claimant after both his right shoulder and cervical spine surgeries. Both of these physicians expressed opinions as to claimant's permanent functional impairment of the cervical spine. In accordance with AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Blaty assessed claimant with 14 percent whole body rating. Also, based on the AMA Guides Third Edition, (Revised), Dr. Murati determined claimant had a 13 percent whole body functional impairment for the loss of cervical range of motion and a 9 percent whole body functional impairment for loss due to the surgically treated lesion. Utilizing the combined value chart of the AMA Guides, these combine for a 21 percent whole body functional impairment.

The Appeals Board acknowledges that, at the request of respondent's insurance carrier, claimant was examined on one occasion by orthopedic surgeon David K. Ebelke, M.D., of Kansas City, Missouri. Dr. Ebelke is a specialist in spinal surgery and saw claimant on March 11, 1996, before Dr. Stein performed the second surgery on claimant's cervical spine on July 15, 1996. Dr. Ebelke concluded that claimant's work, while employed by the respondent, did not contribute to his cervical spine problems. The doctor

opined that the natural history of cervical spondylosis, degenerative disc disease, and a prior fusion created additional loads on the disc adjacent to the fusion and would otherwise caused claimant to have ongoing neck pain. The doctor did not recommend further surgery, would not assess any additional permanent impairment, and would not impose additional permanent restrictions.

The Appeals Board concludes, based on the more persuasive medical opinion of the treating physician, neurosurgeon Paul S. Stein, M.D., who treated claimant both before and after the June 21, 1993, accident, that this accident permanently aggravated claimant's preexisting cervical degenerative disc disease making it more symptomatic and necessitating another surgical procedure. Accordingly, the Appeals Board concludes that claimant's June 21, 1993, accident and subsequent July 15, 1996, cervical surgery resulted in an 17.5 percent permanent functional impairment of the body as a whole. The 17.5 percent permanent functional impairment rating was arrived at by giving equal weight to the opinions of Dr. Murati and Dr. Blaty.

**Did claimant prove he suffered a work-related right shoulder injury on June 21, 1993?**

The Appeals Board finds that the answer to this question is contained in claimant's testimony and the testimony of Harry C. Morris, M.D., the orthopedic surgeon who surgically repaired claimant's right shoulder rotator cuff tear.

During the May 2, 1995, preliminary hearing, claimant testified he first started having right shoulder problems in December 1994 or January 1995. He testified he hurt his right shoulder performing exercises at home as prescribed by the physical therapist. He testified he was pushing a pillow upward against the wall when his right arm felt like he pulled something. The next morning claimant was unable to raise his right arm.

Claimant first saw Dr. Morris for right shoulder pain on May 22, 1995. Dr. Morris testified that the only history claimant gave him in regard to when his right shoulder problems started was the June 21, 1993, work accident. Claimant did not give Dr. Morris a history of hurting his right arm while performing exercises at home in December 1994 or January 1995.

On August 4, 1997, claimant testified by deposition and was asked how he developed right shoulder problems. Claimant replied that his right shoulder problems started during physical therapy in El Dorado at Dr. Shapiro's direction. He felt shoulder pain as he was performing some stretching exercises with a rubber band or stick.

Finally, on December 16, 1997, at the continuation of his regular hearing testimony, claimant was asked if he started experiencing shoulder pain in December 1994 or January 1995. He replied, "I don't recall," and "I had shoulder pain even from the first surgery." Claimant was then asked if he recalled that he alleged he injured his shoulder secondary

to physical therapy he was performing. Claimant answered "Yeah, I recall that." But he went on to further testify that he did not remember the date this occurred. He also testified he did not remember if the date was before or after the June 21, 1993, accident.

Dr. Morris first treated claimant's right shoulder problem conservatively placing him in a physical therapy program and prescribing pain medication. But in July 1995 an MRI scan revealed a rotator cuff tear. On August 31, 1995, Dr. Morris performed a right shoulder diagnostic arthroscopy with decompression acromioplasty and open rotator cuff repair. After the surgery, claimant was placed in a work conditioning and hardening program. On December 9, 1996, Dr. Morris determined that claimant had reached maximum medical improvement and released claimant with permanent restrictions and a 15 percent permanent functional impairment rating of the right upper extremity that converted to a 9 percent whole body functional impairment rating.

During Dr. Morris' deposition, he was shown a video tape of claimant refereeing a girls basketball game on January 14, 1995. The video tape showed claimant raising his right arm above shoulder level effortlessly without any sign of pain or discomfort. Dr. Morris testified that when a person of claimant's age suffers a rotator cuff tear there is a severe onset of pain and the person can not move his shoulder. Claimant did not relate such a history to Dr. Morris after his June 21, 1993, injury. Dr. Morris also testified that claimant's range of motion exhibited in the video tape was normal range of motion that did not indicate he had a rotator cuff tear. The doctor further testified that at the time he first examined claimant on May 22, 1995, claimant had good range of motion but was in pain. Between May 1995 and August 31, 1995, the date the doctor operated on claimant's right shoulder, claimant exhibited more pain, he had a more restrictive active range of motion, and more weakness. After reviewing the video tape, Dr. Morris could not attribute claimant's rotator cuff tear to any work activity or any other activity that claimant had described to him.

Based on claimant's inconsistent testimony, the testimony of his treating physician, Dr. Morris, and the video tape, the Appeals Board concludes claimant has failed to prove that his right shoulder rotator cuff tear was either caused by his June 21, 1993, work-related accident or was caused or aggravated by shoulder exercises in December 1994 or January 1995. Accordingly, claimant's claim for workers compensation benefits for the right shoulder rotator cuff tear is denied.

### **Is the Fund liable for any portion or all of claimant's neck injury?**

For the respondent to shift all or a portion of its liability to the Fund, the respondent must prove it either hired or retained claimant in its employ despite its knowledge that claimant had an impairment which constituted a handicap in obtaining or retaining employment. Also, the respondent must prove the preexisting impairment either caused or contributed to a subsequent work-related injury or disability. See K.S.A. 1992 Supp. 44-567(a).

The Administrative Law Judge found respondent had failed to prove that claimant's preexisting cervical functional impairment had any relationship to the June 21, 1993, cervical injury. The Administrative Law Judge relied on the medical opinions of Dr. Murati and Dr. Ebelke as the basis for that finding. The Appeals Board disagrees with the Administrative Law Judge and finds that the most persuasive and credible medical opinion on the issue of Fund liability is the testimony of claimant's treating physician, Dr. Stein.

After the September 19, 1989, injury and the February 1, 1990, C4-5 anterior diskectomy and interbody fusion, Dr. Stein released claimant recommending that he not return to his welding job but to return to lighter work. The doctor assessed claimant with a 15 percent permanent functional whole body impairment. Dr. Stein testified that the claimant had degenerative changes in his cervical spine at the time that he performed the February 1, 1990, surgery. The doctor went on to opine that claimant's June 21, 1993, injury would not have occurred but for his preexisting cervical degenerative disc disease. Specifically, Dr. Stein testified the June 21, 1993, accident aggravated claimant's preexisting cervical degenerative disc problems and resulted in further nerve root compression at the C6-7 level and the need for additional surgery.

Claimant testified that as a result of the September 19, 1989, injury and the subsequent cervical surgery, he was off work for six or seven months and his immediate supervisor at that time had knowledge of the injury. Respondent returned claimant to a warehouse job instead of his regular mechanical specialist job because the warehouse job was lighter work.

After surgery, claimant saw the company physician, Phillip S. Olsen, M.D., for continued neck pain and Dr. Olsen provided claimant with pain medication. Also after the first surgery, claimant also saw Philip R. Mills, M.D., for continued neck pain and received injections from Dr. Mills. But claimant, at the time of his June 21, 1993, injury, had returned to work without restrictions to his mechanical specialist job and had not sought treatment from a physician for neck pain since September of 1992.

The Appeals Board finds claimant's testimony coupled with the testimony of his treating physician, Dr. Stein, established that after claimant's September 19, 1989, work-related accident and surgery, claimant had a preexisting impairment that constituted a handicap, respondent had knowledge of the handicap, and retained claimant as a handicap employee. Additionally, claimant's June 21, 1993, injury would not have occurred but for claimant's preexisting functional impairment of the cervical spine. The Appeals Board, therefore, concludes that the Fund should be liable for all the workers compensation benefits paid to the claimant in relation to his June 21, 1993, cervical injury.

**Are the Fund and respondent entitled to a credit for the September 19, 1989, injury as provided for in K.S.A. 44-510a (Ensley)?**

In a settlement hearing held on October 29, 1991, claimant settled his workers compensation claim in relation to his September 19, 1989, work-related accident. The settlement consisted of respondent paying all of claimant's authorized medical expenses in the amount of \$22,193.48; 29.86 weeks of temporary total disability at \$271 per week or \$8,092.06; and a lump sum amount of \$41,500 for permanent partial general disability benefits. The lump sum settlement amount was based on approximately a 18 percent permanent functional impairment rating.

K.S.A. 44-510a (Ensley) generally provides that if an employee has received compensation or if compensation is collectible for a work-related injury and the employee suffers a later injury, compensation payable for any permanent disability for the later injury shall be reduced by the percentage of contribution the prior disability contributes to the overall disability following the later injury.

Currently K.S.A. 44-501(c) requires a reduction in an award by a injured worker's preexisting functional impairment, if the preexisting impairment contributed to the resulting disability. But K.S.A. 44-501(c) does not apply in this case because it was not effective until July 1, 1993, and the accident date in this case is June 21, 1993.

Dr. Stein opined that claimant would not have injured his cervical spine at work on June 21, 1993, but for his preexisting cervical degenerative disc disease. Also, after the September 19, 1989, injury and subsequent surgery, Dr. Stein opined that claimant had a 15 percent whole body functional impairment. He related the 15 percent rating to claimant's disc protrusion and neck surgery. Furthermore, Dr. Stein testified that claimant had degenerative disc disease at the C6-7 level before the June 21, 1993, accident.

Claimant received a lump sum amount of \$41,500 to settle his September 19, 1989, cervical injury. It is noted in the settlement hearing that this lump sum amount was a strict compromise of all issues and amounted to an approximate 18 percent permanent functional impairment rating. The 18 percent compromise impairment rating was arrived at by considering Dr. Stein's 15 percent rating, Dr. Schlachter's 20 percent rating, and a 3 percent rating determined by Dr. Mills for an upper thoracic strain which was in addition to the cervical injury. Additionally, the \$41,500 lump sum payment was noted in the settlement hearing to include consideration for claimant giving up his right to future medical benefits and review and modification of the Award.

Although Dr. Stein opined that claimant's June 21, 1993, injury would not have occurred but for claimant's preexisting degenerative disc disease, the record does not contain any evidence as to the specific amount that claimant received in the settlement of his previous September 19, 1989, injury that would indicate what portion of the total settlement is attributable to claimant's preexisting degenerative disc disease. Also, the record does not indicate what portion of the settlement amount was compensation for claimant relinquishing his right to future medical treatment and modification of the award. In order for a K.S.A. 44-510a (Ensley) credit to apply, the amount of the preexisting



disability that contributed to the overall disability following the later injury has to be proved. The Appeals Board concludes the record does not contain sufficient information to determine the percentage that claimant's settlement of his September 19, 1989, injury contributed to claimant's overall disability following the June 21, 1993, injury. Therefore, the Appeals Board finds that the request for a credit as prescribed by K.S.A. 44-510a (Ensley) is denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated August 18, 1998, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Edward Rando, and against the respondent, Texaco Refining & Marketing, and its insurance carrier, CIGNA, and the Kansas Workers Compensation Fund, for an accidental injury to claimant's cervical spine which occurred June 21, 1993, and based upon an average weekly wage of \$734.80.

Claimant is entitled to 69.85 weeks of temporary total disability compensation at the rate of \$299 per week or \$20,885.15, followed by 345.15 weeks of permanent partial disability compensation at the rate of \$85.73 per week or \$29,589.71 for a 17.5% permanent partial general disability, making a total award of \$50,474.86.

As of July 30, 1999, there is due and owing claimant 69.85 weeks of temporary total disability compensation at the rate of \$299 per week or \$20,885.15, followed by 248.72 weeks of permanent partial disability compensation at the rate of \$85.73 per week in the sum of \$21,322.77 for a total of \$42,207.92, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,266.94 is to be paid for 96.43 weeks at the rate of \$85.73 per week, until fully paid or further order of the Director.

Further medical treatment for claimant's injuries may be awarded upon proper application to and approval by the director.

Unauthorized medical expense up the statutory maximum is awarded to the claimant upon proper presentation of the expense.

All authorized medical expenses are ordered paid by the respondent for claimant's cervical spine injury.

The Kansas Worker's Compensation Fund is ordered to pay 100 percent of the Award.

All remaining orders contained in the award are adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gerard C. Scott, Wichita, KS  
Douglas C. Hobbs, Wichita, KS  
Marvin R. Appling, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director